Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
Equal Access and Interconnection *Obligations Pertaining* to Commercial Mobile Radio Service Providers	)	CC Docket No. 94-54

COMMENTS
of the
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

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Summary

The National Telephone Cooperative Association submits these comments in the proceeding examining interconnection terms and conditions between commercial mobile radio service ("CMRS") providers and other telecommunications providers.

At the outset, under the newly enacted Telecommunications Act of 1996, the Commission cannot mandate a specific type of compensation between CMRS and other providers. Neither the bill and keep proposal nor any of the proposed alternatives satisfy the new statutory framework. That framework contemplates private negotiation of the charges for the termination of traffic between local exchange carriers and CMRS providers.

The interconnection policies contained in the Telecommunications Act of 1996 are designed to promote a "level playing field." Therefore, interconnection terms and conditions should not be aimed at promoting one competitor type over another. The Commission should leave to the providers (under negotiation) and the states (under arbitration) to resolve the questions of fair interconnection terms. A bill and keep approach would only be fair where the parties exhibit mutual obligations under interconnection that are in near balance. CMRS to LEC interconnection is an example of an arrangement far from such balance.

Assuming that the Commission had authority to proceed with a prescription of the CMRS-LEC interconnection terms, the bill and keep approach is unsound and should not be adopted. The NPRM overlooks, or treats simplistically, many of the network features and operating characteristics that make interconnection between LECs and CMRS providers not equal. These Comments describe several cost, service pricing, and user differences between CMRS and LECs that must be factored into any fair interconnection terms. Directional traffic between CMRS and

LEC networks is not likely to be equal as the result of these differences. In any event, implementation of a bill and keep approach would not be as simple as presumed and would hold the potential to harm users with a reallocation of cost recovery. The cost of termination is not zero, and interconnection should not be set at a zero rate. Finally, peak usage considerations are more complex than merely measuring peak usage between providers' networks.

The Commission should not, as a long term proposition, seek to enact provisions for interconnection that depend on subtle distinctions between facilities and services of different providers. Such distinctions would lose ground against the changing industry's technical convergence and provider partnering agreements.

The comparison to extended area service agreements among LECs is not totally relevant and does not necessarily serve as support for a bill and keep approach. There are considerable differences between interconnection for extended area service and that for CMRS to LEC networks.

The access charge discussion in the NPRM regarding interstate traffic originated and terminated by CMRS providers is factually inconsistent with the operating arrangements of many CMRS providers and the apparent trend in the industry towards single provider services.

The conclusion to be drawn from the discussion in these Comments is that no specific Commission regulatory action with respect to CMRS-LEC interconnection compensation issues is needed at this time. The Commission should terminate this portion of the proceeding.

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NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") files these Comments in response to the Notice of Proposed Rulemaking, FCC 95-505, released by the Commission on January 11, 1996, in the proceedings captioned above ("NPRM"). By this NPRM, the Commission is examining policies related to interconnection between commercial mobile radio service ("CMRS") providers and local exchange carriers ("LECs"). The NPRM proposes to adopt an interim compensation method for LEC-CMRS interconnection which the Commission labels as a "bill and keep" approach.[1] The Commission will apparently also be considering a number of longer term options for prices, terms, and conditions between CMRS and other network providers. The NPRM also proposes that existing access charges be applied to dedicated transmission facilities connecting LEC and CMRS networks, that interconnection compensation arrangements be made public, and that CMRS providers be compensated on a joint access charge basis for interstate traffic carried by interexchange carriers ("IXCs").

[1] NPRM at para. 3.

NTCA is an association of approximately 500 small LECs providing telecommunications services across rural and small town America. Some of NTCA's members are sole providers of cellular service while others offer cellular service in partnership with other entities. Some other members have plans to become Personal Communications Services ("PCS") providers in and around their service areas. Smaller numbers of members are also involved in other services that the Commission considers CMRS.[2] As such, all NTCA members could be affected by a decision in this proceeding on the LEC side of the interconnection issue while many others may be affected on both sides of this arrangement.

I. EXECUTIVE SUMMARY

The proposals contained in the NPRM have now been superseded by the enactment of the Telecommunications Act of 1996 (1996 Act). As Section II below discusses, the specific NPRM proposals are no longer consistent with the requirements of the controlling law. Apart from this inconsistency, there is little, if any, merit to a bill and keep approach. In Section III below, NTCA discusses the flawed rationale for a "sender keeps all" mechanism and why it should not be adopted. The CMRS-IXC access charge proposal must be consistent with current cellular operations. The conclusion to be drawn from the discussion herein is that no specific, additional regulatory action on the CMRS-LEC interconnection compensation issues presented in this NPRM is needed at this time. The Commission should terminate this portion of the proceeding.

[2] See NPRM at n. 1.

II. THE NPRM HAS BEEN SUPERSEDED BY THE TELECOMMUNICATIONS ACT OF 1996.

The Commission may not mandate the "bill and keep" approach or adopt the proposed alternatives. When the Commission adopted this NPRM , it tentatively concluded that it had sufficient authority to implement its proposal for interconnection compensation on a bill and keep basis and to adopt either of three alternative frameworks governing compensation arrangements for LEC-CMRS interconnection. The Commission can no longer rely on the authorities it cited in the NPRM. The 1996 ACT includes new provisions governing interconnection arrangements and compensation, including compensation for termination of traffic by LECS, CMRS providers and others.

The three alternatives proposed include a non-binding model, a mandatory general model and a specific federal requirements approach.[3] Under the non-binding model, the Commission would require its own specific approach for terminating interstate traffic, bill and keep, for example, while encouraging states to adopt the same approach for intrastate traffic. The second approach would mandate a federal policy framework or a set of parameters (general or specific) but would not set all interconnection rates. The Commission states that it could, under this model, require bill and keep for all off-peak traffic but allow states to choose their own method for peak period intrastate traffic. The third alternative would promulgate specific and mandatory federal requirements for interstate and intrastate LEC-CMRS interconnection arrangements. All of these proposals are premised on the Commission's belief that it has authority to preempt the states on these matters under the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),

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[3] NPRM at paras. 107-111.

specifically the provisions of 47 U.S.C. § 332.[4] The Commission also states that the measures comport with its obligation to preserve universal service as provided for in the Communications Act of 1934 and its conclusion that its interconnection policies should "encourage the development of CMRS, especially in competition with LEC-provided wireline service."[5]

The Commission can no longer implement policies that are aimed at developing competitors of one ilk. It must consider new principles announced in the 1996 Act.[6] These principles contemplate a level playing field in a de-regulatory environment. Moreover, the 1996 Act specifically addresses compensation arrangements and obligations involving LECs. The obligation of each LEC in general is defined as "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[7] Incumbent LECs' additional obligations are addressed in 47 U.S.C. § 251(c).[8] That section states that these LECs have the duty to provide interconnection "on rates, terms, and conditions that are just, reasonable and nondiscriminatory in accordance with the terms and conditions of the agreement [negotiated

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[4] NPRM at para. 111.

[5] NPRM at para. 2.

[6] The 1996 Act states that Section 253 does not affect the application of Section 332(3) to commercial mobile service providers. Section 253 prohibits state barriers to entry and gives the Commission authority to preempt conflicting laws or regulations. 47 U.S.C. § 332(3) preempts State rate and entry regulation of CMRS providers. The 1996 Act does not similarly provide that 47 U.S.C.§ 332(3) remains unaffected by the provisions governing interconnection and procedures for negotiation, arbitration, and approval of agreements.

[7] 47 U.S.C. § 251(b)(5)(1996).

[8] Incumbent LECs are defined in 47 U.S.C. § 153 (h) in reference to an area in which they provided local exchange service on the date of enactment of the 1996 Act. NTCA members are incumbent LECs but they like other rural telephone companies are exempt from the duties of incumbent LECs until they receive a bona fide request for interconnection. A State commission is required to make specific findings, not relevant here, before terminating the exemption. 47 U.S.C. § 251(f) (1996).

or arbitrated arrangements] and the requirements of this section and section 252."[9]

It is significant that the Act exempts incumbent LECs from the obligations imposed on all LECs in 47 U.S.C. § 251(b) and on incumbent LECs in § 251(c) when interconnection arrangements are settled through voluntary negotiations.[10] Under Section 252, a new statutory framework that provides for private settlements is authorized and established as the norm to govern compensation and other arrangements.[11] The framework leaves little room for regulatory intervention. Voluntary negotiated agreements must be submitted to the State commission which can then only reject an agreement on a finding that:

> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity....[12]

The State commission has more flexibility to reject agreements adopted by arbitration or to impose conditions on the parties during the course of arbitration. The State can reject an arbitrated solution on grounds that it does not meet the requirements of Section 251, Commission regulations under Section 251 and pricing standards in Section 252(d).[13] Section 252(d)(2)(A) dictates what the State may consider in determining whether incumbent LECs are in compliance

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[9] 47 U.S.C. § 251(c)(2)(D)(1996).

[10] 47 U.S.C. § 252(a)(1)(1996).

[11] This framework reflects the current industry practice of negotiating interconnection arrangements and compensation.

[12] 47 U.S.C. § 252(e)(2)(1996).

[13] A State can also impose conditions to ensure compliance with Section 251, Commission regulations under Section 251, and pricing standards in cases where it resolves open issues submitted for arbitration by the parties. 47 U.S.C. Sections 252(b)(4), 252(c)(1996).

with the added obligations imposed on them in Section 251(b). Section 252 (d)(2)(A) states:

(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC-

(A) IN GENERAL.- For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), [referring to obligation to establish reciprocal compensation arrangements] a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless-

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and condition determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.[14]

It must be remembered that these pricing standards only come into play in cases where the State must resolve arbitrated issues and apply the standards for arbitration as outlined in 47 U.S.C. § 252(c). Then and only then, will the State be required to apply 252(d)(2) pricing standards to determine whether the terms for reciprocal compensation (in an agreement involving an incumbent LEC) are just and reasonable.

A pertinent rule of construction is written into law and follows the pricing standards paragraph that explains how changes for transport and traffic termination may be treated. It reads:

(B) RULES OF CONSTRUCTION.- This paragraph shall not be construed

(i) to preclude arrangements that afford mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual

[14] 47 C.F.R. Sec. 252(d)(2)(A)(1996).

recovery (such as bill-and-keep arrangements) . . . .[15]

It is obvious from a reading of the pricing standards subparagraph, 47 U.S.C. § 252(d)(2)(A), and its explanation that while Congress did not intend to preclude bill-and-keep arrangements, it expected that they would be employed only where the parties believed their mutual obligations were in relative balance. State commissions may approve arbitrated or negotiated agreements that provide for this form of compensation. They do not, however, in the case of negotiated agreements have the authority to mandate bill-and-keep or any other compensation method. It is also obvious that Congress intended that LECs recover their costs for terminating minutes without having to endure a rate case. A second rule of construction to paragraph 252(d)(2) states that it is not to be construed "to authorize the Commission or any State Commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls."[16]

In summary, neither the bill and keep interim proposal nor any of the proposed alternatives satisfy the new statutory framework. That framework contemplates, for the most part, private negotiation of the charges for the termination of traffic between LECs and CMRS providers. The Commission should therefore terminate this proceeding and concentrate on the rulemaking it is required to conduct to implement Sections 251 and 252 so that parties can begin to operate under the new framework in the manner contemplated by the 1996 Act.

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[15] 47 U.S.C. § 252 (d)(2)(B)(i)(1996).

[16] 47 U.S.C. § 252(d)(B)(ii)(1996).

III. THE BILL AND KEEP APPROACH IS UNSOUND AND SHOULD NOT BE ADOPTED.

As stated in II above, NTCA believes the Commission is without authority to mandate bill and keep. Nonetheless, it wishes to make clear that bill and keep is an unsound approach which should not be encouraged even if the Commission had authority to adopt rules governing interconnection compensation. Further, the Commission should not suggest bill and keep as a national policy goal worthy of state implementation or appropriate in all cases.

A. THE NPRM OVERLOOKS MANY PROBLEMS AND INCOMPATIBILITIES PRESENTED BY A BILL AND KEEP APPROACH.

1. CELLULAR AND LEC OPERATIONS ARE PROFOUNDLY DIFFERENT IN COST INCURRENCE AND SERVICE PRICING WHICH GREATLY AFFECTS INTERCONNECTION TERMS.

There are a number of incompatibilities and inconsistencies between the operations of LECs and the predominant CMRS providers, namely cellular. These differences in technical, functional, pricing, and marketplace properties makes the rationale for a bill and keep approach, hypothesized partially on the proposition of similarity in these properties, highly suspect.

Cellular providers charge the terminating user for incoming calls; LECs do not. Cellular providers charge a usage based charge for both originating and terminating calls; in most cases, LECs do not charge on a usage basis for calls made to, or received from, other users in the local calling area. LECs, instead, charge a flat rate for unlimited calling in the local area. In nearly all cases, the local calling area is much different for cellular callers (usually much larger) than for wireline users.

To use terms the Commission often cites, the cost causation nature of the cellular networks bears no resemblance to that of LECs. The cellular provider incurs no costs associated with plant dedicated to individual users. Most, if not all, of the cellular providers network is traffic sensitive in nature.[17] LECs incur costs in the form of local loops regardless of whether any network user makes use of these loops.[18] There is no fixed cost analogy in the cellular provider world.[19]

The charges for service and the pricing structure used are untariffed and virtually unregulated for cellular providers. LECs service pricing structure and levels are regulated and highly prescribed. LECs continue to shoulder Universal Service obligations; CMRS providers, to date, have none. LECs are subject to complicated separation of their operations between state and interstate jurisdictions, CMRS providers do not apply jurisdictional separations.[20]

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[17] Actually, cellular providers costs would seem to depend on the peak number of simultaneous calls, peak traffic, total traffic and total calls.

[18] The NPRM contains troubling analysis with respect to cost concepts and LECs' local loops. "The cost of a dedicated facility can be attributed directly to the party ordering the service that uses that facility. To the extent that the benefits of a dedicated facility accrue to the party whom it is dedicated, it is efficient for that party to pay charges that recover the full cost of the facility." NPRM at para. 43. The danger of this statement is that it is added in glaringly general fashion to the further, but incorrect, presumption that the party which ordered the facility is the only party that receives any benefits from the facility and therefore should fully pay for it. First, the fact is that the telephone company ordered the facility when it engineered its local distribution area coverage. Second, all other callers benefit by the fact that individual users are connected to the network. Other calling and called parties benefit greatly from the provision of that loop to that customer, namely businesses that want to call other users and businesses that want to receive calls from potential patrons as in the case of 800 calls. In each example, businesses benefit greatly in the form of increased business and revenues. In any event, every network user benefits somewhat equally by the connection of every other user.

[19] The analog is the cellular phone. Admittedly, cellular providers cross-subsidize the cost of the phone through charges for usage.

[20] Of course, there are no fundamental reasons why the interstate portion of CMRS providers operations could not be determined in a similar manner as that used for LECs.

The conclusion is that LECs and CMRS operations are not equal and the interconnection compensation should not be equal. The terms of interconnection must recognize the greater responsibility that LECs have.

2. TRAFFIC BETWEEN CELLULAR AND LEC NETWORKS WILL NOT BE EQUAL IN DIRECTION.

Under the differences in operation discussed above, pricing to reflect those differences and the disparate public interest issues between CMRS and LEC providers, traffic between cellular and LEC networks will likely not be equal in direction any time soon. These conditions; i.e., differences in cost incurrence and pricing structures, are not likely to change in the near future. A bill and keep approach will not promote equalization of traffic.[21]

3. A BILL AND KEEP APPROACH WOULD NOT BE SIMPLE.

Bill and keep is not as "open and shut" case of administration as the Commission assumes.[22] If LECs are forced to a zero termination charge, they may need in many cases to recover this lost cost recovery via other rates. The NPRM states that under zero terminating rate "each network recovers from its end-users the cost of both originating traffic delivered to the

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[21] The Commission cites reasons other than terminating charges as causing the gross imbalance in traffic. Technical limitations such as battery life of cellular phones is mentioned. NPRM at para. 14. If reluctance to receive calls is caused by a technical inferiority of cellular then it should be prepared to accept the consequences. Lower value technologies should not be promoted by charges on other users. The Commission apparently has overlooked fraud as another reason for low terminating use. Some cellular users do not turn their instruments on unless they want to make a call, thereby somewhat decreasing their chances of interception by others who intend to make fraudulent calls using the legitimate cellular users account. Again, the traffic inequality is a consequence of the technology, not the actions of interconnecting carriers and their customers.

[22] NPRM at para. 61.

other network and terminating traffic from the other network."[23] Under this line of thinking, maybe LECs would want to recover this cost or lost revenues in the form of originating and terminating per-minute charges on those landline users that originate or terminate calls, to and from CMRS users, just as cellular providers do on the other end. In any event, users will be confused by the new recovery method.[24]

4. A BILL AND KEEP APPROACH WOULD HARM USERS.

NTCA is not persuaded by the argument that bill and keep presents no harm because carriers can just recover costs from their own subscribers.[25] It would seem extremely insensitive to all network users to disregard the fact that it is mostly those that use cellular that want and benefit from the interconnection. The vast majority of wireline users are indifferent to any value obtained by cellular interconnection. Asking the LECs to raise charges to LEC users would be unfair and harmful to those that do not make or receive calls to or from CMRS users, and do not wish to in the future.

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[23] NPRM at para. 60.

[24] An alternative method of achieving equal interconnection compensation would be to require cellular providers to adopt an identical rate structure for their end of the operation; i.e., charging a flat rate for all calls made from cellular users to landline users. Or maybe cellular providers should stop charging its users on a usage basis for terminating calls. Such a change would greatly affect the direction of traffic and the reluctance of cellular users to receive calls. If this were to be carried to the "sender pays" conclusion whereby the terminating usage based charge were applied to the wireline originating caller, traffic from landline users to cellular users would decrease from current levels reflecting landline users relative service and price valuations. NPRM at n. 76. Of course, this solution is inconsistent with the principle of rate deregulation of CMRS providers, but it illustrates how the two subsets of the industry are dissimilar.

[25] The Commission has apparently adopted CTIA's argument. NPRM at paras. 37 and 62. "We also tentatively conclude that a requirement that LECs and CMRS providers not charge one another for terminating traffic from the other network would not violate any party's legal rights. Specifically, we believe that a bill and keep requirement would not deprive either LECs or CMRS providers of a reasonable opportunity to recover costs they incurred to terminate traffic from the other's network, because these costs could be recovered from their own subscribers." Id. at para. 62.

The relative value of the interconnection to different users is being ignored in this matter. The government cannot expect to be the infallible judge of relative societal benefit of one type of technology and service over another. However, the proposals in this rulemaking are based on the conclusion that all wireline users should be delighted with the prospect of helping CMRS users get a foothold in the network. No such determination of the value of either networks' contribution to the public interest has been attempted. NTCA maintains that the value of mutual interconnection to CMRS users is markedly higher than for the average LEC user.[26]

Moreover, maintaining a Universal Service network whereby every citizen can participate in the information age benefits is an objective served primarily by the LEC industry. The contribution of CMRS providers to the achievement of these public interest goals has not been shown by argument or existing conditions.[27] The Commission has never imposed Universal Service responsibilities or developed mechanisms to promote these goals from within the CMRS world.[28]

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[26] CMRS need landline customers to call. The ability of landline users to call CMRS users is of lower value because the nature of mobile service is such that frequently the called party is unavailable. Party lines exhibit similar drawbacks in that lack of response or unavailability of the line discourage use and value of that use.

[27] The exception is that small and rural LECs have an interest in making radio spectrum available in very high cost areas as an alternative to wired systems. NTCA has asked the Commission to make available spectrum for fixed basic service in such areas. This use of spectrum promotes Universal Service goals. See RM-8159, In the Matter of Petition to Authorize Co-primary Sharing of the 450 MHz Air-Ground Radiotelephone Service with BETRS, and Comments filed by NTCA on March 1, 1996, in WT Docket No. 96-6.

[28] "[W]e have pursued our mandate . . . by adopting specific programs designed to advance universal service in areas and for individuals where special needs exist." NPRM at para. 5. The Commission further states: "Our primary means for achieving these public interest goals has been competition." Id. at para. 6. While competition may drive price to the lowest common denominator cost and may make producers more efficient, it makes it exceedingly difficult, nevertheless, to promote public interest goals that maximize the

(continued...)

5. THE COST OF TERMINATION IS NOT ZERO.

CMRS interconnectors present traffic demands on LECs' networks. This traffic places the same cost demands on the network as any other local traffic. Theoretical long run incremental cost ("LRIC") arguments simply result in minimal prices for new interconnectors leaving to all other customers the remaining non-incremental cost.

Maybe the argument should be turned around. IXCs, new interconnectors, connecting LECs' customers need access to the local distribution system of any one LEC. These set of interconnecting carriers can sell services to customers that allow those customers to terminate calls ubiquitously. These carriers should pay the connecting LEC for the fulfillment of that termination need.[29] Once the interconnecting carriers have established their need in terminating traffic and are asked to pay for the facilities to permit such termination, any local user of the terminating system's facilities can argue on a LRIC basis that he or she should not be charged anything for making local calls within the local area.[30] The cost of the local distribution had to be

[28](...continued)
value of the network in terms of Universal Service. Reasonable pricing for all and the provision of quality services in areas that free market competitors would ignore are both objectives to which competition presents intense conflict. Congress has now made it clear that policy makers must come to grips with the necessary provisions to allow competition to emerge but to be tempered in a manner that Universal Service is promoted. Only with strong provisions, often in conflict with the motives of competitors, can both these objectives be met at the same time.

[29] In fact, if traffic sensitive costs are incurred in relation to peak demands placed on switching equipment as submitted in the NPRM, then the costs of LECs' local switching should be recovered from those services that create the biggest demand at peak hours. In large metropolitan areas, the greatest demands are placed by business users, during the mid-part of the business day, making local and long distance calls. As such, it is appropriate for business customers to shoulder a large portion of network cost recovery. These same business users benefit commercially from the existence of the network and the commerce that is allowed to be conducted over it.

[30] The discussion here in the text also responds to the discussion in the NPRM about the nature of
(continued...)

incurred to provide for the termination needs of the outsiders, the incremental cost of providing local calling is very nearly zero. Therefore, LECs should offer a basic service for free to residential users that allows local users to make local calls free outside the busy hour. This conclusion is as much nonsense as the one in which interconnectors argue they came last so they should only pay the modest, almost zero, LRIC price.

LRIC may be an useful intellectual, analytical curiosity and tool, but provides little guidance to the real world practitioner. Nor does LRIC provide much analytical assistance in a world where policy demands that Universal Service objectives be retained in a competitive, interconnecting environment. Basic users cannot be asked to pay for the remainder of cost after the incremental payers have had their way.

While the incremental cost of terminating traffic during non-peak times may be small, this is not the relevant measure to use to determine cost or price. In the case of wireline networks, a large portion of costs are nevertheless incurred but do not vary on a direct and continuous basis with usage. LRIC becomes less useful, if at all, when applied to industries with large amounts of non-incrementally dependent costs.

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[30](...continued)
carrier common line ("CCL") charges. NPRM at para. 68. An IXC needs local distribution loops to every user in the nation before it can begin to offer long distance service that purports to be ubiquitous. The view that IXCs' long distance customers should help in the cost recovery of those loops is consistent with that need and resulting benefit. Why should long distance callers, through their IXC providers, get for free what would cost them considerably to construct and operate for themselves? Therefore, the discussion about the CCL in the NPRM is misplaced. The relative portion of overall common line costs reflected in the current CCL charge is small and not a subsidy. Since it is not a subsidy, CMRS providers and their users should share in the cost recovery along with other service users.

As we all understand, if all network providers (or for that matter any other industry businesses) set out to charge all their customers on a LRIC basis, they would all go out of business. The NPRM's long discussion of how costs in excess of LRIC should be recovered points to the extent that non-LRIC dependent costs represent a large portion of telecommunications networks.[31] When the potential impact on prices of the "in excess of LRIC" costs are considered, the price of services is more dependent on the manner in which these costs are spread to prices than perhaps the manner in which theoretical LRIC determinations are developed in the first place. Much more work and analysis is needed before this industry plunges into a LRIC pricing scheme.

Once the shortcomings of LRIC are recognized and the effect of costs in excess of LRIC are also considered, arguments that the cost of terminating traffic at non-peak hours is very nearly zero starts to lose its initial, however self-serving to interconnectors, appeal. The initial zero hypothesis becomes appreciably greater than zero; anything greater than zero is not zero.

6. PEAK USAGE CONSIDERATIONS ARE MORE COMPLEX THAN THE NPRM RECOGNIZES.

Traffic sensitive costs appear to be related to peak usage demands, and peak period analysis may be somewhat interesting in designing appropriate pricing policies. However, peak usage between network providers does not necessarily capture peak demand of users. The average peak value among networks has use in engineering traffic capacity, but its usefulness for exact pricing policies is more complicated. Each user presents different peak usage demands. All we observe is the combined total of individuals. The combined total may create a peak that

[31] NPRM at paras. 49-55.

does not correspond to the peak of many individual users. The actions of interconnectors in establishing price for the interconnectors' services affects the peak usage between networks. Treating providers on the basis of combined peak usage will not bear out the theoretical effect on price, cost, demand and economic efficiency that the theorists contend because the dynamics are affected by individual users, not providers. There remains a question about whether the deferred demand by providers, to reflect the demand of users, is an efficient substitute for cost and demand dynamics of users.[32]

For the dynamics of users to be reflected in providers choices, the Commission would need to understand fully the interests of individuals and reflect those interests in the actions of providers. Experience in the interstate access charge world with IXCs and their users does not suggest that the Commission possesses such an ability to require a reflection in deferred demand dynamics. If cost is incurred based on peak demand, and if charges are to be imposed on those that create the peak demand, then the charges should be to those individuals that create the peak periods. Charges to providers (as in access charges and interconnection compensation) would be one step away from actual "causers." The point here is that while peak period study is also interesting, we should not attempt to read too much into the results.

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[32] Time of day access charges demonstrate relevant issues. LECs can price access to IXCs on the basis of time of day to reflect network to network peak considerations. But unless IXCs pass along identically constructed time of day pricing to long distance callers, the demand changes anticipated will not arise. It is only the pricing to end users that has an effect on peak demand.

B. NETWORKS WILL NOT BE DISTINGUISHABLE BY FACILITY OR SERVICE TYPE.

Provisions for interconnection that depend on the subtle distinctions between the facilities and services of different types of providers will not be sustainable in the new environment.[33] Rules or policies that would attempt to determine precisely the demarcation between the service operations of different providers' networks would lose ground against the changing industry's technical convergence and provider partnering agreements.[34]

Any notion that interconnecting networks will evolve in the new competitive era into a "traffic-sender-keeps-all," zero-terminating interconnection charge framework is an unlikely speculation given the transformation underway in this industry, the actual networks, and the marketplace that is developing. The bill and keep approach seeks to establish a fundamentally new framework for the industry that is inconsistent with obvious trends, contrary to the likely result that will prevail, and counter to the emerging themes in telecommunications networks' development. Interconnection requirements cannot be developed simply to finance the entry (potentially inefficient) of new competitive providers by imposing a penalizing expense on the customers of existing carriers.[35]

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[33] However, the new telecommunications law explicitly does not disrupt the current IXC-LEC access charge structure or compensation system. See 47 U.S.C. § 251(g) (1996).

[34] As an excellent example, look at the disparate treatment afforded ESPs for their interstate traffic versus that afforded IXCs. ESPs, such as Internet providers, are now providing the same long distance voice message services (essentially for free) as IXCs, yet are exempted from most payment of access charges and any contribution towards the cost of maintaining a ubiquitous local switched network for all. See Preparation for Addressing Universal Service Issues: A Review of Current Interstate Support Mechanisms, released by the Common Carrier Bureau on February 23, 1996, at pp. 126-127.

[35] The promotion of new competitive entrants in what is a highly capital intensive telecommunications industry, while arguably a worthy goal, should not be financed out of the pockets of the (continued...)

C. THE ARGUMENTS FOR BILL AND KEEP ARE NOT SUFFICIENTLY ANALOGOUS TO THE RELEVANT ISSUES.

The Commission and interested parties have cited other forms of interconnection and their terms and conditions as arguments in favor of analogous treatment of CMRS-LEC interconnection. However, the examples noted in the NPRM are not sufficiently analogous as to lend support for the bill and keep proposal.

First, the Commission apparently relies partially on CTIA's argument that bill and keep is appropriate because "it is the dominant practice between adjacent LECs . . . for terminating local extended area service traffic between adjacent exchanges."[36] Extended area service ("EAS") is different from cellular to LEC interconnection. First, EAS is between mutually exclusive providers for which there is a net benefit to both providers' customers, and most often the relative benefit is approximately equal to both sets of customers.[37] CMRS as it develops increasingly into fixed applications and begins to present potentially competitive replacement to the landline services (particularly if CMRS were to enjoy free interconnection) would not be mutually exclusive as EAS has been. More importantly, the public understands that the value of

[35](...continued)
owners of the traditional facilities' providers or out of the pockets of the users of those traditional providers' services. These providers do not deserve a penalty for committing capital to achieve the goal of quality telecommunications services to all citizens of this nation, a challenge that partially arose out of a public policy government challenge. Instead, if the promotion of new competitors has merit, it should be achieved, and the capital intensive activities assisted, through more general public resources than through the confiscation of property of the existing companies. This penalty to existing companies will lead to higher rates, or deteriorating service to users, or both.

[36] NPRM at para. 37.

[37] The calling interests are many times nearly balanced between the exchanges of the two providers.

interconnection is higher to the CMRS users than it is to the body of landline users.[38] Therefore, EAS is not an appropriate comparison or support for similar compensation treatment.

The amount of EAS traffic in each direction is more likely to be approximately equal for neighboring LECs than for CMRS to LECs .[39] Furthermore, neighboring LEC exchanges are likely to exhibit similar cost characteristics while overlapping CMRS and LECs exhibit fundamentally different network cost properties.[40] The two forms of interconnection are not analogous.

In discussing the merits of "private negotiation" and "efficient forms of interconnection," the NPRM mentions the "Internet" as an example whereby interconnection has developed "without the intervention by outside parties."[41] This example is misleading with respect to the issues here. First, interstate access for the origination and termination of Internet interstate traffic has been afforded exemption from interstate access charges by decree from the Commission. This mandated exemption totally undermines any potential interconnection negotiation.[42] The

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[38] For mobile users calling landline users, the mobile caller knows that a phone will ring and someone may answer it. For landline callers in the other direction, the caller does not know whether a cellular phone will ring, does not know if the cellular phone is on, and does not know whether anyone will answer.

[39] Deviation from a bill and keep arrangement for EAS is most likely to be negotiated when the traffic is not equal in both directions or the calling interest is grossly unbalanced.

[40] Some cost similarities are also involved when competitive local service providers connect with incumbent LECs. NPRM at para. 24.

[41] NPRM at para. 11.

[42] When the interstate traffic associated with Internet service was small, in the interest of promoting rapid development of what was then a nascent service industry, the industry could look the other way with respect to the discrimination between service users caused by the ESPs' exemption from access charges. However, in recent years, the amount of interstate traffic on the Internet has grown astronomically, and this harm can no longer be disregarded. The exemption now causes discriminatory treatment of one set of interstate users over others. See note 5, supra.

Commission cannot claim that interconnection with LECs for Internet providers has arisen without intervention since it was the Commission's own intervention that has led to the current terms. Therefore, the marketplace lesson, if any, from the Internet's experience is tainted by this mandate.[43]

IV. THE ACCESS CHARGE DISCUSSION IN THE NPRM REGARDING INTERSTATE TRAFFIC ORIGINATED OR TERMINATED BY CMRS PROVIDERS IS FACTUALLY INCONSISTENT WITH THE OPERATING ARRANGEMENTS OF MANY CMRS PROVIDERS AND THE APPARENT TREND IN THE INDUSTRY.

The Commission is also considering in this proceeding "whether LECs or IXCs should remit any interstate access charges to CMRS providers" in the case of "jointly provided access service." The Commission has never concluded that equal access should be required of CMRS providers. Many small cellular providers provide to their users both local cellular and long distance service bundled together under their cellular service brand. In these situations there is no access relationship because the local access provider and the long distance provider are the same entity. More importantly, the 1996 Act expressly prohibits requiring equal access of CMRS

[43] Nor does experience with resale provide direction in the instant proceeding. Such a leap of logic would presume that resale is axiomatic with respect to efficient marketplaces. Instead, resale is not the norm in many other industries. Without mandating policies, it may very well not have arisen naturally in the telecommunications business. But, in any event, resale distorts the marketplace and prevents challenges to achievement of public policy goals in several ways. It makes it more difficult for the underlying carrier to serve the public interests of all its users if it has to deal with a reseller capturing only the most lucrative ones. Resale, in terms of production, demand, cost and price, presents a deception on those desiring to use telecommunications services. Users are deceived about differences in quality and the identity of the actual carrier, and the carriers involved find it more difficult to distinguish themselves in the marketplace. Resellers have the mandated right to share unfairly in that quality and innovation notoriety. The nature of resellers' interconnection is tainted by many distortions that makes its conceptual application here of little use. The Commission is presented with a serious challenge in developing resale rules among local carriers that recognize these conflicting issues.